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OCTOBER TERM, 1995

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STATE OF CALIFORNIA, DIVISION OF LABOR
STANDARDS ENFORCEMENT, DIVISION OF
APPRENTICESHIP STANDARDS, DEPARTMENT OF
INDUSTRIAL RELATIONS; COUNTY OF SONOMA,
Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC.;
MANUAL J. ARECO, DBA SOUND SYSTEMS MEDIA,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICI CURIAE* OF THE
AMERICAN ASSOCIATION OF RETIRED PERSONS
AND THE NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION IN SUPPORT OF NEITHER PARTY

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BRIEF *AMICI CURIAE* OF THE
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INTEREST OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than 33 million persons, age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity and purpose. As a method of promoting independence, AARP attempts to foster the economic security of individuals as they age by seeking to

increase the availability, security, equity, and adequacy of private and public pension plans. In 1993, AARP established its Pension Equity Project to advocate for security and equity in retirement benefits and to educate the public about the need for greater safeguards in the pension system.

The National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of approximately 2,800 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters. NELA has devoted itself to supporting precedent-setting litigation affecting the rights of individuals in the workplace.

AARP and NELA are qualified to brief the Court on the implications of the decision in this case, having participated as *amici curiae* in numerous cases involving ERISA and other employment laws, including, among others, the cases of *Varsity Corp. v. Hawe*, 116 S. Ct. 1065 (1996), *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993), and the leading decision on ERISA benefit claims, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

AARP's members, NELA members' clients, and other older Americans depend on ERISA to protect their rights under private employer-sponsored employee benefit plans. 29 U.S.C. § 1001 *et seq.* Contrary to its purpose, a statute that was designed to safeguard employee benefits has, all too frequently, been used to deprive employees of rights they previously enjoyed under state law while failing to provide any comparable federal remedy. The proliferation of ERISA preemption cases raises the question of whether ERISA is having an effect contrary to that intended by those who favored its adoption. Indeed, ERISA preemption is

often used as a sword instead of a shield.^{1/}

This case presents the Court with the opportunity to establish a precise test for determining the boundaries of the phrase "relates to an employee benefit plan" in ERISA's preemption clause. The decision in this case will have a direct and vital bearing on the economic security of AARP's members, NELA members' clients and other older Americans. In light of the significance of the issues presented by this case, AARP and NELA respectfully submit this brief *amici curiae*.^{2/}

SUMMARY OF ARGUMENT

The number of cases this Court has decided construing the phrase "relates to an employee benefit plan" in ERISA's preemption clause illustrates the lower courts' struggle in defining the limits of "relates to."^{3/} As the Court has recognized, this clause is not a model of legislative drafting, and it has been difficult to provide clear guidance to the lower courts for demarcation of the limits of

^{1/} See *Rokohl v. Texaco*, 77 F.3d 126, 130 (5th Cir. 1996) ("an employer may not use its ERISA plan as a 'gimmick' to trigger preemption and thereby avoid litigation in state court. In the classic metaphor, ERISA preemption may be used as a shield but not as a sword."(citations omitted)).

^{2/} The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

^{3/} E.g., *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers' Insurance Co.*, 115 S. Ct. 1671 (1995); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825 (1988); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Insurance v. Massachusetts*, 471 U.S. 724 (1985); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

this clause.⁴ Hence, not only has development of a uniform common law on ERISA preemption been frustrated, but the courts have been flooded with these cases.

AARP and NELA suggest that the Court adopt the Ninth Circuit's test in *General American Life Ins. Co. v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993), for defining when a state law "relates to an employee benefit plan."⁵ This test determines whether a state law relates to an employee benefit plan by asking whether the state law encroaches on the relationships regulated by ERISA. *Id.* at 1521-22. The *Castonguay* test serves to develop more uniformity in the interpretation of the phrase "relates to an employee benefit plan," to promote Congress' intent in passing ERISA's preemption clause and to decrease the number of preemption cases flowing into the courts.

⁴ *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers' Insurance Co.*, 115 S. Ct. 1671 (1995).

⁵ ERISA preemption analysis involves numerous steps. The initial inquiries under ERISA § 514(a) are whether a State, state law and an employee benefit plan are involved. ERISA §§ 514(c)(1) & (c)(2), 29 U.S.C. §§ 1144(c)(1) & (c)(2). See *Massachusetts v. Morash*, 490 U.S. 107 (1989) (vacation payments from an employer's general assets did not constitute a plan and therefore state law cannot be preempted); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (a state law requiring a one-time severance payment was not preempted because there was no plan due to a lack of an ongoing scheme or administrative structure). Although *amici*'s brief is limited to the issue of a test for the meaning of "relates to," *amici* recognize that ERISA preemption analysis does not end after it is determined that a state law relates to an employee benefit plan. In this case, if it is determined that the state law relates to a plan, then it must be determined whether a "savings clause" applies to prevent preemption. See ERISA §§ 514(b) & (d), 29 U.S.C. §§ 1144(b) & (d).

Under this test, the California state law on apprenticeship standards "relates to an employee benefit plan" because the law regulates the level of benefits that participants will receive and for which participating employers are obligated. Consequently, this state law is preempted under ERISA § 514(a), 29 U.S.C. § 1144(a), unless a savings clause applies to prevent preemption.

ARGUMENT

I. THE COURT SHOULD DEVELOP A MORE PRECISE TEST FOR DETERMINING WHEN A STATE LAW "RELATES TO AN EMPLOYEE BENEFIT PLAN" SO THAT ERISA'S PREEMPTION CLAUSE WILL BE UNIFORMLY APPLIED.

The Court has recognized that Congress intended federal courts to develop federal common law in interpreting ERISA. *Varity Corp. v. Howe*, 116 S. Ct. 1065, 1070 (1996) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989)). And, the Court has done so in the area of ERISA preemption.⁶ However, the lower courts are still struggling with the boundaries of ERISA's preemption clause, particularly with the meaning of the

⁶ E.g., *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers' Insurance Co.*, 115 S. Ct. 1671 (1995); *John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. 86 (1993); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Massachusetts v. Morash*, 490 U.S. 107 (1989); *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825 (1988); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

phrase "relates to an employee benefit plan."^{7/} Indeed, this Court recently acknowledged that its attempts to provide detailed guidance concerning ERISA preemption have been inadequate, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.* ("Travelers"), 115 S. Ct. 1671, 1676 (1995), mainly because ERISA's preemption clause is not a "model of legislative drafting and the legislative history . . . is sparse." *John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. 86 (1993) (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (quoting *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985))).

This Court's own experience with ERISA preemption illustrates the lower courts' struggle. In fact, this court has issued sixteen decisions on this issue, even though ERISA has only been in effect for twenty-one years. More than one-third of the cases which the Court has decided concerning ERISA have been preemption cases. Significantly, the federal courts are being inundated with unwarranted preemption defenses in cases which have little to do with furthering Congress' intent of uniform administration of employee benefit plans.

This torrent of cases is due to the vague statutory language concerning the limits of ERISA's preemption clause as well as the perception that ERISA preemption can be used as both a sword and a shield to prevent participants from pursuing *bona fide* claims. *See Rokohl v. Texaco*, 77 F.3d 126, 130 (5th Cir. 1996). ERISA's muddled language has

^{7/} See *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 135 n.3 (1992) (Steven, J., dissenting) (noting that in December 1992, there were 2800 cases on LEXIS addressing ERISA preemption); *HealthAmerica v. Menton*, 555 So. 2d 235, 241 (Ala. 1989), cert. denied, 493 U.S. 1093 (1990) (White and O'Connor, JJ., dissenting to denial of certiorari); see generally S. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 18 n. 42 (1995) (detailing the volume of cases and law review articles on ERISA preemption).

resulted in a lack of uniformity on this issue, certainly undercutting Congress' objective in obtaining nationally uniform administration of employee benefits plan. *Travelers*, 115 S. Ct. at 1677-78. In order to provide more uniformity in the application of ERISA's preemption clause and to decrease the number of cases on preemption issues in the federal courts, *amici* respectfully suggest the adoption of a precise test for determining when a state law "relates to an employee benefit plan."

II. A STATE LAW "RELATES TO AN EMPLOYEE BENEFIT PLAN" WHEN IT REGULATES THE PRINCIPAL RELATIONSHIPS THAT ERISA REGULATES.

A. State Law Is Not Preempted Unless Congress' Intent To Do So is Clear.

ERISA preemption analysis is no different than any other preemption analysis.^{8/} *John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. 86 (1993) ("we discern no solid basis for believing that, Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis"). Accordingly, "the purpose of Congress is the ultimate touchstone of preemption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))).

"To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133,

^{8/} As with other statutes, the Court has cautioned that, in order to avoid unintentionally encroaching on state authority, courts should be reluctant to find preemption when interpreting a federal statute. U.S. CONST. art. VI, cl. 2; *Travelers* at 1676; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("the historic police powers of the State [are] not to be superseded by . . . [federal law]").

138 (1990). Congress' intent as to ERISA's preemptive effect is explicitly stated in the statutory language of ERISA § 514(a), 29 U.S.C. § 1144(a). Section 514(a) states that ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan" covered by the statute.²

In *Shaw*, the Court explained that state law relates to an employee benefit plan "if it has a connection with or reference to such a plan." *Travelers*, 115 S.Ct. at 1677 (quoting *Shaw*, 463 U.S. at 96-97).¹⁰ Nevertheless, the Court admonished that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100, n. 21. It follows that "relates to" must have some limitation, otherwise it has no meaning. *Travelers*, 115 S. Ct. at 1677. To hold otherwise would be inconsistent with the presumption that Congress does not intend to preempt state law, and that state law must be given the fullest effect possible. *Travelers*, 115 S. Ct. at 1676-78; *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825, 841 (1988).

² Congress also provided that ERISA will not preempt any state criminal law or any state law regulating insurance, banking or securities, as long as an employee benefit plan is not deemed to be in the business of insurance. ERISA § 514(b)(2), 29 U.S.C. § 1144(b)(2). In addition, Congress provided that ERISA shall not alter, supersede or modify any other federal law. ERISA § 514(d), 29 U.S.C. § 1144(d). This brief will not these address statutory provisions.

¹⁰ State laws that specifically reference ERISA plans are preempted to the extent they regulate ERISA plans. See, e.g., *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992) (striking down District of Columbia law that "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted"); *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825 (1988) (a garnishment statute singling out ERISA plans for special treatment was held preempted, but the general garnishment statute was not preempted as applied to ERISA plans).

The Court reviewed ERISA's structure and purpose to determine the purpose of the preemption clause and the limits of "relates to." *Travelers*, 115 S. Ct. at 1677-78. The Court concluded that "the basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* However, the Court did not set forth a test or standard to apply its conclusion to the meaning of "relates to." Consequently, this case presents the Court with the opportunity to establish a precise test for determining the boundaries of the phrase "relates to an employee benefit plan" in ERISA's preemption clause.

B. Whether A State Law Regulates A Principal Relationship Already Regulated By ERISA Is A Test That Defines The Boundaries of "Relates To An Employee Benefit Plan."

In order to readily determine the boundaries of "relates to" given Congress' purpose for enacting the preemption clause, *amici* suggest a test for analyzing the state law by determining whether the relationships regulated by the state law are also regulated by ERISA. Judge Kozinski, writing for the Ninth Circuit in *General American Life Ins. Co. v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993), explained this test:

To determine whether a state law is preempted we must look at whether it encroaches on the relationships regulated by ERISA. State tort and contract causes of action, for instance, don't apply to transactions between plans and their participants, because the relationship between plan and participant is, under ERISA, a matter of exclusively federal concern. Wrongful discharge laws don't apply to employee terminations carried out to avoid

benefit payments, because the employer-employee relationship is -- insofar as it deals with benefit plans -- also an exclusively federal matter. State law can, however, apply to transactions between plans and their creditors or their landlords or their own employees, because those relationships are outside ERISA's purview.

Id. at 1522 (citations omitted). The practical effect is that ERISA will preempt claims where ERISA comprehensively regulates the principal ERISA relationships.^{11/}

Judge Kozinski's rationale for this test flows not only from ERISA's statutory language and its purpose, but also from his understanding of federal jurisprudence.

The key to distinguishing between what ERISA preempts and what it does not lies, we believe, in recognizing that the statute comprehensively regulates certain relationships: for instance, the relationship between plan and plan member, between plan and employer, between employer and employee (to the extent an employee benefit plan is involved), and between plan and trustee. Because of ERISA's explicit language, and because state laws regulating these relationships (or the obligations flowing

^{11/} *Accord, Memorial Hospital System v. Northbrook Life Insurance Co.*, 904 F.2d 236, 249 (5th Cir. 1990); *Sommer Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises*, 793 F.2d 1456, 1467-68 (5th Cir. 1986), cert. denied, 479 U.S. 1034 (1987); *Lordmann Enterprises, Inc. v. Equicor, Inc.*, 32 F.3d 1529, 1533-34 (11th Cir. 1994), cert. denied, 116 S. Ct. 335 (1995). The Eighth Circuit uses the ERISA principal entity test as one of several factors in determining whether a state law "relates to" a plan. *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital, Inc.*, 947 F.2d 1341, 1344-45 (8th Cir. 1991), cert. denied, 504 U.S. 957 (1992).

from these relationships) are particularly likely to interfere with ERISA's scheme, these laws are presumptively preempted.

But ERISA doesn't purport to regulate those relationships where a plan operates just like any other commercial entity -- for instance, the relationship between the plan and its own employees, or the plan and its insurers or creditors, or the plan and the landlords from whom it leases office space. State law is allowed to govern these relationships, because it's much less likely to disrupt the ERISA scheme than in other situations. Moreover, if these relationships were governed by federal law, federal courts would have to invent a federal common law of contracts, tort, property, corporation -- something that would run against the grain of our federal system.

Id. at 1521-22 (citations and footnotes omitted).

The *Castonguay* test is consistent with the Court's admonition in *Shaw* because when a state law concerns a third party and does not regulate any of the principal ERISA relationships, the effect on employee benefit plans will be too tenuous or peripheral to find that it relates to a plan. Moreover, this test is also consistent with Congress' objective to avoid multiplicity of regulation; obviously if state law does not regulate any of the principal ERISA relationships, there will not be duplicative regulation. *Travelers*, 115 S. Ct. at 1677-78. As a corollary, this test is consistent with the presumption that Congress does not intend to preempt state laws unless Congress' intent to do so is clear. *Id.*

The *Castonguay* test will plainly encompass areas of traditional ERISA concern: laws that regulate the types of benefits or terms of a plan; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (claim for improper processing of benefits claims is preempted); laws that create specific

requirements as to funding reporting and disclosure, vesting, etc.; laws that establish rules for the calculation of benefits; *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (interference with calculation of benefits through state antisubrogation statute); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (prohibition of offset of workers' compensation benefits against retirement benefits preempted); and laws and common law rules providing for remedies for misconduct growing out of the administration of the plan, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). These are examples of state laws that regulated the relationships between ERISA principals that are also comprehensively regulated by ERISA -- in these cases, plan members and the plan.

In order to determine whether a state law relates to an employee benefit plan, the *Castonguay* test asks whether the state law reaches a relationship already regulated by ERISA. *General American Life Ins. Co. v. Castonguay*, 984 F.2d at 1521-22. Accordingly, claims made against an employer in its corporate, rather than its fiduciary capacity, would not relate to employee benefit plans and would not be preempted. Cf. *Akers v. Palmer*, 71 F.3d 226 (6th Cir. 1995) (decision to terminate plan is made in corporate capacity and thus claims are not preempted). A state law requiring a hospital to collect a surcharge from a participant would not be preempted because it regulates the hospital (not an ERISA principal) and the participants. *Travelers*, 115 S. Ct. at 1680. Claims for medical malpractice against doctors would not be preempted because the doctor is not one of the principal ERISA entities. *Rice v. Panchal*, 65 F.3d 637 (7th Cir. 1995). A successful wrongful discharge claim under a whistleblower statute which includes payments to an ERISA fund as part of the "back-pay" remedy would not be preempted because the statutory remedy regulates the employment relationship between the employer and employee. *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989).

C. **California's State Law On Apprenticeship Standards Regulates Principal Relationships Regulated By ERISA And Therefore "Relates To An Employee Benefit Plan."**

California's state law on apprenticeship standards regulates two of the key ERISA principal relationships: the relationship between a plan^{12/} and the participant, and the relationship between the plan and the participating employer.

California's law regulates the types and level of benefits the participants (or apprentices) will receive. California's law also orders the participating employer to make contributions to the apprenticeship program, and details the amount and basis of the contributions. Quite simply, California's law directly regulates the level of benefits that participants will receive and for which participating employers are obligated.

Under the *Castonguay* test, the California state law on apprenticeship standards relates to an employee benefit plan under ERISA § 514(a), and is preempted by ERISA, unless the savings clause applies.

^{12/} For purposes of this brief, *amici* assume, without argument, that the joint apprenticeship training committee is an apprenticeship program within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1). See n. 5, *supra*.

CONCLUSION

For the foregoing reasons, AARP and NELA urge the Court to affirm the decision of the Ninth Circuit Court of Appeals on the issue of whether the California state law on apprenticeship standards relates to an employee benefit plan.

Respectfully submitted,

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